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In The

Supreme Court of the United States

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS AND INTERVENOR

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In accordance with this Court's Rule 36, the General Conference of Seventh-day Adventists respectfully submits this Brief as Amicus Curiae in support of the Briefs

*Letters from all parties consenting to the participation of the General Conference of Seventh-day Adventists as amicus curiae have previously been filed with the Clerk of this Court.

on the Merits filed by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints in Case No. 86-179 and by the United States of America in Case No. 86-401.

INTEREST OF AMICUS CURIAE

The General Conference of Seventh-day Adventists is located in Washington, D.C. and is the governing body of the World-Wide Seventh-day Adventist Church. The Seventh-day Adventist Church currently has approximately five million members. The mission of the Seventh-day Adventist Church is carried on through a variety of means including educational, publishing and health care institutions. The Seventh-day Adventist Church, along with other religious organizations, has a keen interest in the outcome of *Amos* since an adverse ruling or a ruling narrowing the rights granted by Congress and guaranteed by the First Amendment to the United States Constitution would have an immediate and devastating impact on the activities associated with the mission of the Church.

SUMMARY OF ARGUMENT

When initially enacted, the prohibition against discrimination on the basis of religion in the Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e, *et seq.*, ("Title VII"), did not apply to "religious activities" of religious organizations. After eight years of experience with that exemption in Title VII, Congress amended the exemption to avoid the difficulties inherent in attempting to distinguish between the religious and secular activities of religious organizations. Affirming the decision of the

Amos court below would, in effect, constitute a repeal of the 1972 amendment and would result in serious entanglement problems both in the judicial and executive branches of government.

ARGUMENT

By enacting Title VII, Congress chose to exercise its authority to prohibit discrimination by private employers. This case comes before the Court because Congress chose not to exercise that authority as broadly as Appellees wish it had and Appellees were able to convince the court below that the Constitution requires the broader exercise. Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin. Section 702 of the Civil Rights Act of 1964, formerly codified at 42 U.S.C. Section 2000e-1, provided that the prohibition against discrimination would not apply to "the employment of individuals of a particular religion to perform work connected with the carrying on" by the religious organization "of its *religious* activities." ("1964 Exemption") (emphasis added).

After eight years of experience with the 1964 Exemption, Congress recognized the difficulties inherent in attempting to distinguish between the religious and secular activities of a religious organization. In 1972, Congress eliminated the religious/secular distinction by amending Section 702 to provide that the prohibition against discrimination would not apply to "the employment of individuals of a particular religion to perform work connected with the carrying on" by the religious organization "of its activities." ("1972 Exemption"). By removing

the word "religious" which preceded the word "activities," Congress extended the exempt status to all activities of religious organizations. The legislative history leading up to the 1972 Exemption makes it clear that Congress intended to avoid the distinction between secular and religious activities of a religious organization which existed under the 1964 Exemption. In discussing the 1964 Exemption, Senator Ervin stated:

> Mr. President, as I construe those words, they attempt to do an impossible thing, that is, to separate the religious activities of a religious corporation, association, educational institution, or society, from those of its activities which can be said to be not religious, non-religious, or unreligious. . . . This is so because the whole religious organization is one body, and yet the bill would attempt to divorce the two kinds of activities, each from the other and give a federal agency the power to dictate, or at least ultimately control, the employment practices of religious corporations, religious associations, religious educational institutions and religious societies from each other.

118 Cong. Rec. at 1973 (1972). Mr. Ervin two years earlier had argued for passage of a similar amendment which would eliminate the distinction between religious jobs and secular jobs:

> Mr. President, under [the 1964 Exemption], if a religious educational institution wanted to employ a professor of mathematics it could be compelled by the Commission to employ an infidel as professor of mathematics. . . . Apart from that, as a matter of policy, I think people who establish a religious institution and people who establish a church should be allowed to select a janitor or a secretary who is a member of the church in preference to some infidel or non-member. However, they could not do that

> under [the 1964 Exemption]. My amendment would exempt religious organizations from the control of the State.

116 Cong. Rec. at 34,565 (1970). Furthermore, Congress was aware and fully intended that the activities of religious organizations, as included in the 1972 Exemption, covered secular jobs as well as religious jobs:

> Many of these religious corporations and associations often provide purely secular services to the general public without regard to religious affiliation, and most of the many thousands of persons employed by these institutions perform totally secular functions. In this regard, employees in these "religious" institutions perform jobs that are identical to jobs in comparable secular institutions.

118 Cong. Rec. at 4813 (1972) (remarks by Senator Williams). Congress, by its 1972 Exemption, intended to prevent excessive government entanglement in the area of employment decisions made by religious organizations based on religious considerations. In the 1972 Exemption, Congress eliminated the potentially entangling inquiry by courts and the Equal Employment Opportunity Commission ("EEOC") as to whether alleged religious discrimination occurred in a religious or secular activity of a religious organization.

The substantive constitutional arguments regarding the 1972 Exemption are addressed in detail in the briefs filed by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints and by the United States of America. These briefs carefully describe the constitutionally mandated balance which Congress must strike in making "no law respecting an establish-

ment of religion, or prohibiting the free exercise thereof." Rather than focus on the underpinnings of the constitutional arguments, this brief will focus on the government entanglement problems which religious organizations will face if Section 702 as it is presently written is declared unconstitutional.

The very entanglement problems which the Constitution prohibits and which Congress intended to eliminate were encountered when the lower court in *Amos* requested information and production of documentation regarding the activities of the Mormon Church. In this regard, the court was attempting to distinguish between the religious and secular activities of the Church and thereby became involved in a detailed examination of Church beliefs, practices, finances, and administration, including a substantive evaluation of the scope and sincerity of asserted religious beliefs.

The entanglement problems experienced by the Mormon Church in *Amos* are but examples of the problems which will be experienced by all religious organizations, including the Seventh-day Adventist Church, if *Amos* is affirmed. The publishing ministry of the Seventh-day Adventist Church presents an example of an area for potential entanglement if the principles announced by the *Amos* court below are followed. As part of its publishing ministry, the Seventh-day Adventist Church utilizes retail book outlets to disseminate literature to church members and non-members alike. While many of the books sold are theological in nature, others deal with topics which, although central to the religious beliefs of Seventh-day Adventists, some would consider secular. For example,

the sale of books advocating healthful living through proper diet and exercise is very much related to the Church's doctrines regarding health, and at the same time such books are in demand by those who seek their contents independent of any view of religious teachings. Whether an enterprise such as a Seventh-day Adventist retail book outlet passes muster as a "religious activity" under the vague and ill-defined test suggested by the lower court in *Amos* begs the more important question of whether there is excessive entanglement created by the application of the test at all. In enacting the 1972 Exemption, Congress, as a body, recognized the impossibility and impropriety of doing what the *Amos* court has attempted to do.

The threat posed to religious organizations by striking down or narrowing the 1972 Exemption is real, not imaginary. Like the court in *Amos*, other governmental entities are becoming entangled in sensitive religious matters in a manner adverse to First Amendment rights and adverse to the clearly expressed intention of Congress as evidenced by the amendment of Section 702. The Seventh-day Adventist Church is already experiencing this entanglement in the operation of its health care system. Because of the Church's strong doctrinal emphasis on healthful living, the ecclesiastical umbrella of the General Conference includes the Church's Department of Health and its world-wide health care system, which are jointly charged with the duty to disseminate the Church's beliefs regarding health and to administer to the health care needs of the world. Within the Adventist Health System in the United States there are approximately 150 hospitals, nursing homes and other health care organi-

zations which collectively employ well over 50,000 employees.

Adventist Health System/United States is a nonprofit corporation organized by the Seventh-day Adventist Church to help carry forward the health message of the Church, "to make man whole." The Articles of Incorporation of the Adventist Health System/United States declare that the "specific purpose of this corporation is to preserve the mission of the Seventh-day Adventist Church as it pertains to its health ministry." The relationship between the Church's doctrine and its operation of health care institutions is set forth in the Church's Statement of Philosophy for Health Care Institutions and Services. That Statement summarizes the Church's doctrines and principles regarding health care as follows:

> In summary, the Adventist health-care institution is a corporate extension of Christ's life and mission and is the Seventh-day Adventist Church fulfilling its health and healing ministry. It is therefore indivisible from the church's total ministry in carrying the gospel to all the world.

In this context, the staffing of Seventh-day Adventist hospitals is of vital concern to the Church. The Statement of Philosophy evidences that concern. Although it affirms the Church's commitment to avoid descrimination on the basis of race, ethnic background, or sex, it firmly asserts the right to make employment decisions on the basis of religion:

> The freedom to hire persons whose lives conform to this philosophy is fundamental to the achievement of the objectives of the church.

Section 702 of the Civil Rights Act, as amended in 1972, confirms that freedom. Most importantly, it does so without resort to investigation and inquiry regarding the religious versus secular nature of the activity of a religious organization. Porter Memorial Hospital, a hospital within the Adventist Health System/United States, is currently involved in litigation which addresses the issue of investigation by the EEOC of religious versus secular activities. *Porter Memorial Hospital v. United States of America, Equal Employment Opportunity Commission*, Civ. No. 86-A-1229, United States District Court for the District of Colorado (filed June 18, 1986).

On November 13, 1984, Sandra Elaine Collins (hereinafter "Collins") filed with the EEOC a charge against Porter Memorial Hospital (hereinafter "Porter") alleging employment discrimination solely on the basis of religion. Shortly thereafter, the EEOC began to process and investigate the charge. In a letter sent to Porter, the EEOC stated:

> Your organization is hereby requested to submit information and records relevant to the subject charge of [religious] discrimination filed with this Commission under Title VII of the Civil Rights Act of 1964, as amended. The Commission is required by law to investigate charges filed with it, and the attached request constitutes a part of the investigation.

In *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), the Fifth Circuit Court of Appeals held that if a religious institution presents convincing evidence that the challenged discrimination falls within the scope of the 1972 Exemption, the EEOC is without jurisdiction to investigate further. In re-

liance upon the 1972 Exemption and the *Mississippi College* case, Porter responded to the EEOC's request for information by presenting an affidavit and other documentary evidence irrefutably establishing the fact that the operation of Porter is an activity of the Seventh-day Adventist Church. On the basis of this evidence, Porter requested the EEOC to determine that it lacked jurisdiction to further process Collins' charge of religious discrimination. Porter also invited any further EEOC inquiries which might be necessary to determine whether Porter was within the scope of the 1972 Exemption, and indicated a willingness to respond to such inquiries.

The EEOC replied by sending an additional questionnaire, dated April 29, 1985, including, among others, the following questions:

1. Provide a detailed explanation which addresses specifically how the Respondent is different in practice than any other secular hospital in Colorado.

2. In actual practice, how was Charging Party's position as Clinical Director of Nursing used to further the religious beliefs and/or tenets of the Church?

3. In actual practice, explain how Porter is furthering the religious beliefs and/or tenets of the Church?

4. Does the Church allow non-Seventh-day Adventist patients to be cared for at the hospital?

5. Does the Church allow smoking in the hospital?

6. Does the Church allow meat to be served to patients?

> 7. Does the hospital require any or all employees and/or patients on a daily, weekly or monthly basis, to attend some form of church religious service where the beliefs and tenets of the church are advocated?

Porter responded, noting that these questions were wholly irrelevant to the issue of whether the EEOC had jurisdiction under the 1972 Exemption to further investigate and process Collins' charge. The 1972 Exemption covers all activities of religious organizations, regardless of considerations such as those raised by the EEOC's second questionnaire. The 1972 Exemption does not specify that an activity of a religious organization must have a certain function or purpose or nature in order to qualify for exempt status. The only qualification is that the activity must be carried out by a religious organization such as the Seventh-day Adventist Church. In *Kings Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D.C. Cir. 1974), the District of Columbia Court of Appeals stated:

> In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption immunized virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act.

Id. at 54. (Footnote omitted.)

In response to the EEOC's second questionnaire, Porter reiterated its position:

> The fact that the Seventh-day Adventist Church is a "religious corporation, association, educational institution or society" and that Porter Memorial Hospital, as part of the Adventist Health Care System, is an "activity" of the Seventh-day Adventist Church should bring the facts of the present case clearly within the 1972 Exemption.

Porter again expressed its willingness to provide any information necessary to determine whether the 1972 Exemption applied to the facts of this case, but declined to answer questions aimed at determining the secular versus religious nature of its activities.

The EEOC has persisted in its investigation and inquiry regarding whether the charge at issue involves an activity which is religious or secular in nature. Even though the EEOC was invited to seek further information concerning whether the operation of Porter is an activity of the Seventh-day Adventist Church, it did not do so.

Instead, the EEOC sent Porter a pre-determination letter indicating its intent to enter a written determination that Collins was discharged due to her religious affiliation and that Collins' "position was secular in nature," involving none of the "tenets, teachings, or practices" of the Seventh-day Adventist Church. Thus, although Porter firmly asserted that the operation of the hospital is central to the objectives, teachings and doctrines of the Seventh-day Adventist Church and supported that assertion with abundant documentation, the EEOC reached a contrary conclusion. The entanglement demonstrated by this

case is the very problem which arises when the government strays beyond the boundaries of the 1972 Exemption.

The distinction between religious and secular activities and between religious and secular jobs finds no basis in statute and has been expressly repudiated by Congress. The EEOC has no authority to narrow the 1972 Exemption by providing exempt status only where religious activities or religious jobs are involved. Regarding attempts to narrow the 1972 Exemption, the Court in *King's Garden, supra,* stated:

> To effect a substantive narrowing of the exemption the courts would have to attempt to divide a sect's various undertakings into "secular" and "religious" categories, but it is precisely this categorization which Congress repudiated in 1972.

498 F.2d at 54, n. 7.

Like the court in the *Amos* case, the EEOC in the *Porter* case is attempting to make a distinction between jobs and activities that are merely associated with a religious institution and those which are substantively more religious in nature. In *N.L.R.B. v. Catholic Bishop,* 440 U.S. 490 (1979), this Court analyzed a very similar situation. In that case, the N.L.R.B. had been making a distinction between schools which were "completely religious" and schools which were "merely religiously associated." The Seventh Circuit Court of Appeals had concluded that the distinction resulted in entanglement problems because it failed to provide a workable guide for the exercise of discretion, especially in an area that "obviously implicates very sensitive questions of faith and tradition." *Catholic Bishop v. N.L.R.B.,* 559 F.2d 1112, 1118 (7th Cir. 1977). On appeal, this Court stated:

> The Board argues that it can avoid excessive entanglement since it will resolve only factual issues.
>
> • • •
>
> [I]t is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d at 1125, 1126. The Court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.

440 U.S. at 502. In *Porter,* the Church has asserted that the operation of the hospital is motivated by religious beliefs and is carried on in furtherance of the mission of the Seventh-day Adventist Church. The EEOC's process of inquiry here impinges upon Porter's rights in the very manner against which this Court warned. In the *Amos* case before this Court, it is the inquiry and determinations of the judicial branch which have resulted in the unconstitutional entanglement. It should be noted, however, that this Court need not reach the First Amendment entanglement issue to reverse the court below. This Court in *Catholic Bishop* concluded:

> Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call

> upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

Id. at 507.

In this case, Congress has not clearly expressed an intent to bring non-religious activities of religious institutions within the jurisdiction of the courts and the EEOC; to the contrary, by enacting the 1972 Exemption, Congress has unequivocally expressed the opposite intent. This Court should not permit the courts and the EEOC to assume jurisdiction where difficult and sensitive questions of religious faith and practice are involved and government entanglement with religion would result.

To avoid government entanglement with religion in cases where there are claims of discrimination on the basis of religion, both the courts and administrative agencies should make a preliminary determination based upon the following questions:

1. Is the activity in which discriminatory action is alleged an activity of a religious organization?; and,

2. Is the reason for the action in fact religious-based? (i.e. Is the religious-based reason real rather than a pretextual cover for race or sex discrimination, for example?)

If both of those questions are answered in the affirmative, neither the courts nor administrative agencies should undertake any further analysis or inquiry. To do so would lead them into the areas of entanglement addressed above. This Court's opinion in *Ohio Civil Rights Commission v.*

Dayton Christian Schools, 477 U.S. —, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), supports the suggestion that this two-prong preliminary determination is appropriate. In that case, it was apparently conceded that the operation of Dayton Christian Schools was an activity of a religious organization. What was in dispute was the actual basis upon which the employment of a teacher at the School was terminated. The Board of the School had made conflicting statements regarding the reason for termination and the terminated teacher alleged sex discrimination and retaliation for asserting statutory rights. The School claimed that exercise of jurisdiction over it by the Ohio Civil Rights Commission violated its First Amendment rights. In that context, this Court stated:

> We therefore think that however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, *if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.*

Id. at 91 L.Ed.2d at 522-523 (emphasis added).

The court in *Amos* and the EEOC in *Porter* have gone beyond the boundaries of Title VII and beyond the scope of investigation and analysis authorized by this Court in *Dayton Christian*. In doing so, they have violated the specific intent of Congress in amending Title VII and have placed the government in a position of serious entanglement with religion.

CONCLUSION

Congress carefully balanced the First Amendment considerations when it amended Title VII in 1972. The court below has upset that balance by declaring the amendment unconstitutional. This Court should reverse and restore the time proven balance carefully fashioned by Congress.

JANUARY 5, 1987

Respectfully submitted,

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